

WHAT IS HEARSAY?

ARTICLE VIII. HEARSAY

MRE	Rule	Notes/Examples
801(a)-(c): Definition of Hearsay	<p>(a) Statement. “Statement” means a person’s <u>oral assertion, written assertion, or nonverbal conduct</u>, <i>if</i> the person <i>intended</i> it as an assertion.</p> <p>(b) Declarant. “Declarant” means the person who made the statement.</p> <p>(c) Hearsay. “Hearsay” means a statement that:</p> <ul style="list-style-type: none"> • (1) the declarant does not make while testifying at the current trial or hearing; and • (2) a party offers in evidence to prove the truth of the matter asserted in the statement. 	<p>Advisory Committee Note: Some nonverbal conduct is clearly tantamount to a verbal assertion</p> <ul style="list-style-type: none"> • When evidence of conduct is offered on the basis that the conduct was not a statement and, therefore, not hearsay, the trial judge must make a preliminary determination to ascertain whether an assertion was intended by the conduct. The burden is upon the party claiming the intention existed.
801 (d): What is NOT Hearsay	<p>(d) Statements That Are Not Hearsay. A statement that meets the following conditions is not hearsay:</p> <p>(1) A Declarant-Witness’ Prior Statement. The declarant testifies and is subject to cross-examination about a prior statement, and the statement:</p> <ul style="list-style-type: none"> a. Is inconsistent with the declarant’s testimony and was given under penalty of perjury at a trial, hearing, or other proceeding or in a deposition; b. Is consistent with the declarant’s testimony and is offered to rebut an express or implied charge that the declarant recently fabricated it or acted from a recent improper influence or motive in so testifying; or c. Identifies a person as someone the declarant perceived earlier. <p>(2) An Opposing Party’s Statement. The statement is offered against an opposing party and:</p> <ul style="list-style-type: none"> a. Was made by the party in an individual or representative capacity; b. Is one the party manifested that it adopted or believed to be true; 	<p>Any statement not offered for the truth of the matter asserted is not hearsay.</p> <ul style="list-style-type: none"> • The prosecution will frequently argue that a statement is not hearsay because it is not being offered for the truth of the matter asserted. • However, even if the judge accepts the prosecution’s characterization of the statement as not offered for the “truth of the matter asserted,” defense counsel may be able to object to the proffered evidence as irrelevant or more prejudicial than probative: <ul style="list-style-type: none"> ○ Irrelevant: The non-truth purpose for which the prosecutor seeks to admit the evidence is not relevant to any material issue in the case. ○ Irrelevant: The evidence has little or no probative value to any material issue in the case, or ○ The probative value of the evidence for that purpose is substantially outweighed by its prejudicial impact.

	<p>c. Was made by a person whom the party authorized to make a statement on the subject;</p> <p>d. Was made by the party's agent or employee on a matter within the scope of that relationship and while it existed; or</p> <p>e. Was made by the party's co-conspirator during and in furtherance of the conspiracy.</p> <p>Note: The statement must be considered but does not by itself establish the declarant's authority under (c); the existence or scope of the relationship under (d); or the existence of the conspiracy or participation in it under (e).</p>	
802: Rule Against Hearsay	Hearsay is not admissible except as provided by law. The words "as provided by law" include other rules prescribed by the Mississippi Supreme Court."	The U.S. Supreme Court has condemned the use of hearsay in delinquency trials, observing that "[n]o reason is suggested or appears for a different rule in respect of sworn testimony in juvenile courts than in adult tribunals." <i>Gault</i> , 387 U.S. at 56-57.

RULE 803: EXCEPTIONS TO RULE AGAINST HEARSAY - Regardless of Whether the Declarant Is Available as a Witness

The following are not excluded by the rule against hearsay, regardless of whether the declarant is available as a witness:

Exception	Rule	Examples
(1) Present Sense Impression.	A statement describing or explaining an event or condition, made while or immediately after the declarant perceived it.	<p><i>e.g.</i>, "He's trying to get into my door. I can see the door handle turning and he keeps banging. He won't stop screaming that he'll kill me."</p> <p>Advisory Committee Note: Precise contemporaneity of the event and the statement may not be possible. A slight lapse may be permissible. Spontaneity is the essential factor.</p>
(2) Excited Utterance.	<p>A statement relating to a startling event or condition, made while the declarant was under the stress of excitement that it caused.</p> <p>Note: The excited utterance exception is similar to the former <i>res gestae</i> rule.</p>	<p><i>e.g.</i>, "Don't kill me!"</p> <p><i>e.g.</i>, "Watch out for the car!"</p> <p><i>e.g.</i>, "Ouch!"</p>
(3) Then-Existing Mental, Emotional or	A statement of the declarant's then-existing state of mind (such as motive, intent or plan) or emotional, sensory or physical	The statement cannot be related to a memory or belief. It must be forward-looking. Generally this involves a criminal defendant's proffer of his or her

Physical Condition.	<p>condition (such as mental feeling, pain or bodily health), but not including a statement of memory or belief to prove the fact remembered or believed, unless it relates to the validity or terms of the declarant's will.</p>	<p>own statement of then-existing state of mind, made during or immediately after the alleged crime.</p> <p><i>e.g.</i>, "I am going to kill Stacy."</p> <p><i>e.g.</i>, "I thought you guys were just investigating white collar crime; what are you doing here? I only came here to get some cigarettes real cheap." (interpreted as "I am here...to get cheap cigarettes" → present state of mind)</p>
(4) Statement Made for Medical Diagnosis or Treatment.	<p>A statement that:</p> <ul style="list-style-type: none"> (A) Is made to any person at any time for - and is reasonably pertinent to - medical diagnosis or treatment. (B) Describes medical history, past or present symptoms or sensations, their inception, or their general cause. (C) Is supported by circumstances that substantially indicate its trustworthiness. <p>In this paragraph, "medical" includes emotional, mental, and physical health.</p>	<p><i>e.g.</i>, "I have this really horrible pain in my stomach, and it is making me feel nauseous." (said to doctor/nurse)</p> <p><i>e.g.</i>, "His car ran right into me! Damn idiot couldn't even see that the light was red."</p> <ul style="list-style-type: none"> ● "His car ran right into me!" would be let in, but "Damn idiot couldn't even see that the light was red." would NOT be let in. <p>Advisory Committee Note: Rule 803(4) represents a deviation from previous Mississippi practice in three significant ways:</p> <ul style="list-style-type: none"> (1) Rule 803(4) permits statements of past symptoms as well as present symptoms. (2) The rule allows for statements which relate to the source or cause of the medical problem, whereas Mississippi courts formerly disallowed such statements. <ul style="list-style-type: none"> (a) While statements about cause are permissible, statements concerning fault are still excludible... (3) The statement may be made either to a physician or to diagnostic medical personnel...
(5) Recorded Recollection.	<p>A record that:</p> <ul style="list-style-type: none"> (A) Is on a matter the witness once knew about but now cannot recall well enough to testify fully and accurately; (B) Was made or adopted by the witness when the matter was fresh in the witness's memory; and (C) Accurately reflects the witness's knowledge. <p>If admitted, the record may be read into evidence but may be received as an exhibit only if offered by an adverse party.</p>	<p><i>e.g.</i>, Witness forgets the license plate number of suspect she gave to the responding police officer while fresh in her mind. The police officer wrote down the number in her presence. The defender may request that the witness read the statement recorded by the officer aloud for the fact-finder at trial.</p> <p>Advisory Committee Note: This exception may not be employed until there has been a preliminary showing that the witness's memory is exhausted to the extent that he is unable to testify fully and accurately.</p>

<p>(6) Records of a Regularly Conducted Activity.</p>	<p>A record of an act, event, condition, opinion or diagnosis if:</p> <ul style="list-style-type: none"> (A) The record was made at or near the time by—or from information transmitted by—someone with knowledge; (B) The record was kept in the course of a regularly conducted activity of a business, organization, occupation or calling, whether or not for profit; (C) Making the record was a regular practice of that activity; (D) All these conditions are shown by the testimony of the custodian or another qualified witness, or by a certification that complies with Rule 902(11) and (E) The opponent does not show that the source of information or the method or circumstances of preparation indicate a lack of trustworthiness. 	<p><i>e.g.</i>, Clerk fills out form indicating that a customer returned a lawnmower. He indicates that the customer was returning it because of a loose cord. The form would only be admissible to show that the lawnmower was in fact returned, but not for the reason. The basis for return was the customer's knowledge, and he or she did not have a business duty to report the reason.</p> <p><i>e.g.</i>, written minutes of a business meeting</p> <p>Advisory Committee Note: It includes records of non-profit institutions and associations. The custodian as well as other qualified witnesses may testify. Thus, it is not necessary to call or to account for all participants who made the record.</p> <ul style="list-style-type: none"> • However, the source of the material must be an informant with knowledge who is acting in the course of regularly conducted activity. See <i>Johnson v. Lutz</i>, 253 N.Y. 124, 170 N.E. 517 (1930).
<p>(7) Absence of a Record of a Regularly Conducted Activity.</p>	<p>Evidence that a matter is not included in a record described in paragraph (6) if:</p> <ul style="list-style-type: none"> (A) The evidence is admitted to prove that the matter did not occur or exist; (B) A record was regularly kept for a matter of that kind; and (C) Neither the possible source of the information nor other circumstances indicate a lack of trustworthiness. 	<p><i>e.g.</i>, Suppose it is routine for a store clerk to fill out a form each time a customer returns an item. If such a form does not exist for the particular item in question, this can be introduced to support the fact that the item was NOT returned.</p>
<p>(8) Public Records.</p>	<p>A record or statement of a public office if:</p> <ul style="list-style-type: none"> (A) It sets out: <ul style="list-style-type: none"> (a) the office's activities; (b) a matter observed while under a legal duty to report, but not including, in a criminal case, a matter observed by law-enforcement personnel; or (c) in a civil case or against the government in a criminal case, factual findings from a legally authorized investigation; and (B) The opponent does not show that the possible source of the information or other circumstances indicate a lack of trustworthiness. 	<p><i>e.g.</i>, voting records</p> <p>This rule specifically excludes police reports in criminal/juvenile delinquency cases.</p>

(9) Public Records of Vital Statistics.	A record of a vital statistic, if reported to a public office in accordance with a legal duty.	<i>e.g.</i> , a birth, death or marriage, if reported to a public office in accordance with a legal duty.
(10) Absence of a Public Record.	<p>Testimony—or a certification under Rule 902—that a diligent search failed to disclose a public record or statement if the testimony or certification is admitted to prove that:</p> <p>(A) The testimony or certification is admitted to prove that</p> <ol style="list-style-type: none"> I. the record or statement does not exist; or II. a matter did not occur or exist, if a public office regularly kept a record or statement for a matter of that kinds; and <p>(B) in a criminal case, a prosecutor who intends to offer a certification provides written notice of that intent at least 14 days before trial, and the defendant does not object in writing within 7 days of receiving the notice — unless the court sets a different time for the notice or the objection.</p>	<i>e.g.</i> , statement in a letter written 25 years ago, if it can be authenticated.
(11) Records of Religious Organizations Concerning Personal or Family History.	A statement of birth, legitimacy, ancestry, marriage, divorce, death, relationship by blood or marriage or similar facts of personal or family history, contained in a regularly kept record of a religious organization.	
(12) Certificates of Marriage, Baptism and Similar Ceremonies.	<p>A statement of fact contained in a certificate:</p> <p>(A) Made by a person who is authorized by a religious organization or by law to perform the act certified;</p> <p>(B) Attesting that the person performed a marriage or similar ceremony or administered a sacrament; and</p> <p>(C) Purporting to have been issued at the time of the act or within a reasonable time after it.</p>	
(13) Family Records.	A statement of fact about personal or family history contained in a family record, such as a Bible, genealogy, chart, engraving on a ring, inscription on a portrait or engraving on an urn or burial marker.	

(14) Records of Documents That Affect an Interest in Property.	<p>The record of a document that purports to establish or affect an interest in property if:</p> <ul style="list-style-type: none"> (A) The record is admitted to prove the content of the original recorded document, along with its signing and its delivery by each person who purports to have signed it; (B) The record is kept in a public office; and (C) A statute authorizes recording documents of that kind in that office. 	
(15) Statements in Documents that Affect an Interest in Property	A statement contained in a document that purports to establish or affect an interest in property if the matter stated was relevant to the document's purpose — unless later dealings with the property are inconsistent with the truth of the statement or the purport of the document.	
(16) Statements in Ancient Documents.	A statement in a document that is at least 20 years old that was prepared before January 1, 1998, and whose authenticity is established.	<i>e.g.</i> , deeds, wills
(17) Market Reports and Similar Commercial Publications	Market quotations, lists, directories, or other compilations that are generally relied on by the public or by persons in particular occupations.	
(18) Statements in Learned Treatises, Periodicals or Pamphlets.	<p>A statement contained in a treatise, periodical, or pamphlet if:</p> <ul style="list-style-type: none"> (A) The statement is called to the attention of an expert witness on cross-examination or relied on by the expert on direct examination; and (B) The publication is established as a reliable authority by the expert's admission or testimony, by another expert's testimony or by judicial notice. <p>If admitted, the statement may be read into evidence but not received as an exhibit. A treatise used in direct examination must be disclosed to an opposing party without charge in discovery</p>	<p><i>e.g.</i>, An expert refers to statements from an accredited psychology journal article/research study.</p> <p>Advisory Committee Note: Rule 803(18) differs significantly from pre-rule Mississippi practice. It allows statements in learned treatises to be admitted as substantive evidence. The statements are only admissible after: (1) the witness testifies that the treatise is reliable, (2) another expert so testifies, or (3) the court takes judicial notice. Even then the treatise may not be used substantively unless the witness relied upon it in his testimony on direct examination or the witness was questioned about it on cross-examination.</p>
(19) Reputation Concerning Personal or Family History.	A reputation among a person's family by blood, adoption or marriage—or among a person's associates or in the community—concerning the person's birth, adoption, legitimacy, ancestry, marriage, divorce,	<i>e.g.</i> , "My sister was adopted" is admissible.

	death, relationship by blood, adoption, or marriage, or similar facts of personal or family history.	
(20) Reputation Concerning Boundaries or General History	A reputation in a community — arising before the controversy — concerning boundaries of land in the community or customs that affect the land, or concerning general historical events important to that community, state, or nation.	
(21) Reputation Concerning Character	A reputation among a person's associates or in the community concerning the person's character.	e.g., "Jonathan has never said a dishonest word."
(22) Judgment of a Previous Conviction.	<p>Evidence of a final judgment of conviction if:</p> <ul style="list-style-type: none"> (A) The judgment was entered after a trial or guilty plea, but not a <i>nolo contendere</i> plea; (B) The conviction was for a crime punishable by death or by imprisonment for more than a year; (C) The evidence is admitted to prove any fact essential to the judgment; and (D) When offered by the prosecutor in a criminal case for a purpose other than impeachment, the judgment was against the defendant. <p>The pendency of an appeal may be shown but does not affect admissibility.</p>	<p>Advisory Committee Note: Rule 803(22) is a significant departure from traditional Mississippi practice. Past Mississippi practice has been to exclude judgments of convictions as substantive evidence of the facts which sustain it. <i>See Gholson v. Smith</i>, 210 Miss. 28, 48 So. 2d 603 (1950).</p> <ul style="list-style-type: none"> • Now, under 803(22), however, evidence of a judgment of guilty in a felony-grade case is admissible as substantive evidence of any fact essential to uphold the judgment. • It is not available where the judgment is based on a plea of <i>nolo contendere</i> or on a misdemeanor conviction. • The exception does not include evidence of the conviction of a third person, offered against the accused in a criminal case, to prove any fact essential to uphold the judgment.
(23) Judgments Involving Personal, Family, or General History, or a Boundary.	<p>A judgment that is admitted to prove a matter of personal, family, or general history, or boundaries, if the matter:</p> <ul style="list-style-type: none"> (A) was essential to the judgment; and (B) could be proved by evidence of reputation. 	
(24) Other Exceptions	<p>A statement not specifically covered by this Rule if:</p> <ul style="list-style-type: none"> (A) the statement has equivalent circumstantial guarantees of trustworthiness; (B) it is offered as evidence of a material fact; (C) it is more probative on the point for which it is offered than any other evidence that the proponent can obtain through reasonable efforts; (D) admitting it will best serve the purposes of these rules and the interests of justice; and 	

	<p>(E) before the trial or hearing, the proponent gives an adverse party reasonable notice of the intent to offer the statement and its particulars, including the declarant's name and address, so that the party has a fair opportunity to meet it.</p>	
<p>(25) Tender Years Exception</p>	<p>A statement by a child of tender years describing any act of sexual conduct with or by another is admissible if:</p> <p>(A) the court — after a hearing outside the jury's presence — determines that the statement's time, content, and circumstances provide a substantial indicia of reliability; and</p> <p>(B) the child either:</p> <ul style="list-style-type: none"> (a) testifies; or (b) is unavailable as a witness, and other evidence corroborates the act. 	<p>Factors to Determine if There is Sufficient Indicia of Reliability:</p> <ul style="list-style-type: none"> (1) Whether there is an apparent motive on the declarant's part to lie; (2) The general character of the declarant; (3) Whether more than one person heard the statements; (4) Whether the statements were made spontaneously; (5) The timing of the declarations; (6) The relationship between the declarant and the witness; (7) The possibility of the declarant's faulty recollection is remote; (8) Certainty that statements were made; (9) The credibility of the person testifying about the statements; (10) The age or maturity of the declarant; (11) Whether suggestive techniques were used in eliciting the statement; and (12) Whether the declarant's age, knowledge, and experience make it unlikely that the declarant fabricated. <p>When any of the hearsay exceptions in Rule 803 are applied in a criminal case, the rights of the defendant under the Confrontations Clauses of Federal and State Constitutions must be respected. <i>Crawford v. Washington</i>, 124 S. Ct. 1354 (2004) (The confrontation clause forbids "admission of testimonial statements of a witness who did not appear at trial unless [the witness is] unavailable to testify, and the defendant had had a prior opportunity for cross-examination.");</p>

RULE 804(a): EXCEPTIONS; DECLARANT UNAVAILABLE AS A WITNESS

MRE	Criteria for Being Unavailable
804(a)	<p>(a) A declarant is considered to be unavailable as a witness if the declarant:</p> <ul style="list-style-type: none"> (1) Is exempted from testifying about the subject matter of the declarant’s statement because the court rules that a privilege applies; (2) Refuses to testify about the subject matter despite a court order to do so; (3) Testifies to not remembering the subject matter; (4) Cannot be present or testify at the trial or hearing because of death or a then-existing infirmity, physical illness or mental illness; or (5) Is absent from the trial or hearing and the statement’s proponent has not been able, by process or other reasonable means, to procure: <ul style="list-style-type: none"> (A) The declarant’s attendance, in the case of a hearsay exception under Rule 804(b)(1) or (6); or (B) The declarant’s attendance or testimony, in the case of a hearsay exception under Rule 804(b)(2), (3), or (4); or (6) Is a child for whom testifying in the physical presence of the accused is substantially likely to impair the child’s emotional or psychological health substantially. <p>But this subdivision (a) does not apply if the statement’s proponent procured or wrongfully caused the declarant’s unavailability as a witness in order to prevent the declarant from attending or testifying.</p>

804(b) EXCEPTIONS

(b) The following are not excluded by the rule against hearsay if the declarant is unavailable as a witness:

MRE	Rule	Example
804(b)(1): Former Testimony	<p>Testimony that:</p> <ul style="list-style-type: none"> (A) Was given as a witness at a trial, hearing or lawful deposition, whether given during the current proceeding or a different one; and (B) Is now offered against a party who had—or, in a civil case, whose predecessor in interest had—an opportunity and similar motive to develop it by direct, cross-, or redirect examination. 	<p><i>e.g.</i>, grand jury testimony</p> <p><i>e.g.</i>, prior testimony from suppression hearing.</p>
804(b)(2): Statement Under the Belief of Imminent Death, or “Dying Declaration”	In a prosecution for homicide or in a civil case, a statement that the declarant, while believing the declarant’s death to be imminent, made about its cause or circumstances.	<i>e.g.</i> , “Jonathan shot me,” made moments before the declarant died, is admissible for the purpose of proving that Jonathan committed murder.
804(b)(3): Statement Against Interest	<p>A statement that:</p> <ul style="list-style-type: none"> (A) A reasonable person in the declarant’s position would have made only if the person believed it to be true because, 	<i>e.g.</i> , “I killed Marco” could subject the declarant to criminal prosecution for murder, and is thus an admissible statement against interest

	<p>when made, it was so contrary to the declarant's proprietary or pecuniary interest or had so great a tendency to invalidate the declarant's claim against someone else or to expose the declarant to civil or criminal liability; and</p> <p>(B) Is supported by corroborating circumstances that clearly indicate its trustworthiness, if it is offered in a criminal case as one that tends to expose the declarant to criminal liability.</p>	<p>One co-defendant's statement against interest is not admissible under this exception against another co-defendant. <i>See Bruton v. U.S.</i>, 391 U.S. 123 (1968) ("where the powerfully incriminating extrajudicial statements of a codefendant, who stands accused side-by-side with the defendant, are deliberately spread before the jury in a joint trial. Not only are the incriminations devastating to the defendant but their credibility is inevitably suspect, a fact recognized when accomplices do take the stand and the jury is instructed to weigh their testimony carefully given the recognized motivation to shift blame onto others.").</p> <p>.</p>
804(b)(4): Statement of Personal or Family History	<p>A statement about:</p> <p>(A) The declarant's own birth, adoption, legitimacy, ancestry, marriage, divorce, relationship by blood, adoption or marriage, or similar facts of personal or family history, even though the declarant had no way of acquiring personal knowledge about that fact; or</p> <p>(B) Another person concerning any of these facts, as well as death, if the declarant was related to the person by blood, adoption or marriage, or was so intimately associated with the person's family that the declarant's information is likely to be accurate.</p>	<p>e.g., "My sister was adopted" is admissible.</p>
804(b)(5): Other Exceptions	<p>A statement not specifically covered by this Rule if:</p> <p>(A) The statement has equivalent circumstantial guarantees of trustworthiness;</p> <p>(B) It is offered as evidence of a material fact;</p> <p>(C) It is more probative on the point for which it is offered than any other evidence that the proponent can obtain through reasonable efforts;</p> <p>(D) Admitting it will best serve the purposes of these rules and the interests of justice; and</p> <p>(E) Before the trial or hearing, the proponent gives an adverse party reasonable notice of the intent to offer the statement and its particulars, including the declarant's name and address, so that the party has a fair opportunity to meet it.</p>	

804(b)(6): Statement Offered Against a Party That Wrongfully Caused the Declarant's Unavailability	A statement offered against a party that wrongfully caused—or acquiesced in wrongfully causing—the declarant's unavailability as a witness, and did so intending that result.	<i>e.g.</i> , Defendant is heard saying to a prosecution witness, "I will mess you up if you testify" prior to trial.
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ADDITIONAL HEARSAY RULES

MRE	Rule	Notes/Examples
805: Hearsay Within Hearsay	Hearsay within hearsay is not excluded by the rule against hearsay if each part of the combined statements conforms with an exception to the rule.	<p>"Double Hearsay": Each layer of hearsay must satisfy one of the hearsay exceptions.</p> <p><i>e.g.</i>, If a witness wants to testify that Sarah told me, "Peter said 'xyz'," then both Sarah's and Peter's statements are hearsay. Consequently a separate ground for admissibility must be found for each statement before the witness can testify.</p>
806: Attacking and Supporting the Declarant's Credibility	When a hearsay statement—or a [non-hearsay] statement described in Rule 801(d)(2)(C), (D) or (E)—has been admitted into evidence, the declarant's credibility may be attacked, and then supported, by any evidence that would be admissible for those purposes if the declarant had testified as a witness. The court may admit evidence of the declarant's inconsistent statement or conduct, regardless of when it occurred or whether the declarant had an opportunity to explain or deny it. If the party against whom the statement was admitted calls the declarant as a witness, the party may examine the declarant on the statement as if on cross-examination.	<p>For example: The defender might challenge testimony offered pursuant to the "Statement Made for Purposes of Medical Diagnosis or Treatment" exception.</p> <p>Advisory Committee Note: Rule 806 permits the impeachment and rehabilitation of a hearsay declarant. The use of inconsistent statements to impeach the declarant is not limited to prior inconsistent statements. Under the rule the inconsistent statements may be statements made subsequent to the out-of-court declaration at hand.</p>

****Note: Federal Rule 807 "Residual Exception" is not part of the Mississippi Rules of Evidence**